

**BEFORE THE
RESPIRATORY CARE BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

DUKE ROCKY TREJOS
3734 N. Shandin Drive
San Bernardino, CA 92407

Case No.: R-2109

OAH No.: 2007110487

DECISION AND ORDER

The attached proposed Decision of the Administrative Law Judge is hereby adopted by the Respiratory Care Board of California, Department of Consumer Affairs, as its Decision in the above entitled matter.

This Decision shall become effective on November 10, 2008.

It is so ORDERED November 3, 2008.

Original signed by:

LARRY L. RENNER, BS, RRT, RCP, RPFT
PRESIDENT, RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

BEFORE THE
RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

DUKE ROCKY TREJOS,

Respiratory Care Practitioner License
No. 8499,

Respondent.

OAH No. L2007110487

Case No. R-2109

PROPOSED DECISION

On July 28, 2008, this matter was heard in Los Angeles, California. Administrative Law Judge Janis S. Rovner presided. Richard Marino, Deputy Attorney General represented Stephanie Nunez (Complainant). Duke Rocky Trejos (Respondent) was present throughout the hearing and represented himself.

Oral and documentary evidence was received and argument was heard. The record was left open until August 29, 2008, to permit Complainant to submit her Certification of Prosecution Costs and to allow Respondent to respond to the submission. Complainant filed and served the Certification on July 31, 2008. Respondent having filed no response, the Certification of Prosecution Costs, an eight page document including the declaration of service, is admitted as Exhibit 6.

The matter was submitted for decision on August 29, 2008, and the Administrative Law Judge issues her factual findings, legal conclusions, and order, as follows.

FACTUAL FINDINGS

Jurisdiction and License History

1. On October 22, 2007, Complainant Stephanie Nunez filed the Accusation in this matter in her official capacity as Executive Officer of the Respiratory Care Board of California (Board). When Respondent filed a Notice of Defense to the Accusation requesting a hearing, this proceeding ensued.

2. On August 2, 1985, the Board issued Respiratory Care Practitioner License Number 8499 to Respondent. The license is in full force and effect and will expire on October 31, 2008, unless renewed.

Board of Registered Nursing License Discipline

3. The California Board of Registered Nursing (BRN) issued Registered Nurse License Number 452302 (RN license), to Respondent on March 31, 1990.

4. (a) On June 11, 2002, the Executive Officer of the BRN filed an Accusation against Respondent, entitled, *In the Matter of the Accusation Against Duke Rocky Trejos,* Case Number 2002-163 (BRN's Accusation).

(b) The BRN's Decision and Order in Case Number 2002-163 became effective on December 8, 2003. The Board based its decision on the stipulated settlement and disciplinary order the Board's Executive Officer and Respondent entered into on December 4, 2002.

(c) In the stipulated settlement and disciplinary order, Respondent admitted all allegations in the Accusation's Second and Fourth Causes for Discipline. Specifically, he admitted that he was subject to discipline for unprofessional conduct under Business and Professions Code section 2762, subdivision (e), in that while on duty as a registered nurse at Brotman Medical Center in Culver City, California on April 3 and 4, 1999, he falsified, or made grossly incorrect, grossly inconsistent, or unintelligible entries, in hospital and patient records related to the administration or disposition of Ativan and Demerol, which are controlled substances. He also admitted that he committed acts constituting incompetence pursuant to Business and Professions Code section 2761, subdivision (a) (1) and California Code of Regulations, title 16, section 1443, while he was on duty as a registered nurse at Brotman Medical Center on April 3 and 4, 1999.

(d) Respondent admitted to the following conduct related to the factual allegations in the BRN's Accusation:

- On April 3, 1999, at 10:30 a.m. he signed out 4 milligrams (mgs) of Ativan, a controlled substance, and charted a wastage of one milligram, but failed to chart the administration of the remaining 3 mgs of the Ativan in the patient's medication administration record or nurse's notes, or otherwise account for the Ativan's disposition in any hospital record.

- On April 3, 1999, at 6:35 p.m., he signed out 4 mgs of Ativan, a controlled substance, for the same patient, but failed to chart the administration of any portion of the Ativan in the patient's medication administration record or nurse's notes, or otherwise account for the Ativan's disposition in any hospital record.
- On April 4, 1999, at 10:00 a.m., he signed out 75 mgs of Demerol, a controlled substance, for a patient, when there was no physician's order, and he failed to chart the wastage of the 75 mgs, or otherwise account for the Demerol's disposition in any hospital records.
- On April 4, 1999, at 8:00 a.m., he signed out 50 mgs of Demerol, a controlled substance, for a patient, but failed to chart the administration of any portion of the Demerol in the patient's medication administration record or nurse's notes, or otherwise account for the Demerol's disposition in any hospital record.
- On April 4, 1999, at 4:00 p.m., he signed out 4 mgs of Ativan, a controlled substance, for a patient, when there was no physician's order, failed to charge the wastage of the Ativan or otherwise account for the Ativan's disposition in any hospital record.
- On April 4, 1999, at 6:30 p.m., he signed out 75 mgs of Demerol, a controlled substance, for the same patient listed in the preceding sentence, but failed to chart the administration of any portion of the 75 mgs of Demerol in the patient's medication administration record or nurse's notes, or otherwise account for the Demerol's disposition in any hospital record.

(e) In the stipulated settlement, Respondent notably did not admit to allegations: (1) That he had taken the Ativan or Demerol from hospital supplies by fraud, deceit, misrepresentation, or subterfuge; (2) that he had possessed the Ativan and Demerol for his own use without lawful authority; or (3) that the conduct to which he admitted in paragraph 4(d), above, constituted gross negligence.

(f) Pursuant to the BRN's Decision and Order in Case Number 2002-163, Respondent's RN license was revoked, the revocation stayed, and the license was placed on probation for a period of three years subject to certain terms and conditions.

5. (a) On November 28, 2006, the Executive Officer of the BRN filed a Petition to Revoke Probation against Respondent, entitled, *In the Matter of the Petition to Revoke the Probation of Duke Rocky Trejos,* Case Number 2002-163 (Petition).¹

(b) The BRN's Petition alleged that Respondent failed to comply with conditions 3, 7, 8, 9, 10, 11, and 12 of his RN license probation, which provide as follows:

- The obligation to cooperate with representatives of the BRN in its monitoring and investigation of respondent's compliance with the probation program (probation condition 3);
- The obligation to engage in the practice of registered nursing in California for a minimum of 24 hours per week for six consecutive months or as determined by the board (probation condition 7);
- The obligation to obtain approval from the BRN before commencing any employment as a registered nurse, to submit all performance evaluations to the BRN from such employment, and to provide any employer with notice of the BRN's decision (probation condition 8);
- The obligation to obtain prior approval from the BRN regarding his level of supervision before commencing employment (probation condition 9);
- The prohibition from working for a nurse's registry (probation condition 10);
- The obligation to complete courses relevant to his practice no later than six months before the end of his probationary term, or his suspension from nursing until he completed courses relevant to his practice (probation condition 11); and
- The obligation to pay \$7,363 in costs no later than three months before the completion of the probationary term (probation condition 12).

¹ Respondent's license had been on probation for about 3 years at the time the BRN filed the Petition to Revoke Probation.

(c) Following an administrative hearing on March 12, 2007, Administrative Law Judge (ALJ) James Ahler found that Respondent violated probationary conditions 3, 7, 8, 9, 10, and 11, and issued a proposed decision revoking Respondent's RN license. Effective July 20, 2007, the BRN issued its Decision and Order revoking Respondent's RN license after adopting ALJ Ahler's proposed decision.²

(d) In finding that cause existed to grant the BRN's Petition and revoke Respondent's RN license for his failure to comply with probationary terms, ALJ Ahler concluded in his proposed decision that:

Since probation was imposed, Trejos has not engaged in the practice of registered nursing in California for a minimum of 24 hours per week for six consecutive months and no alternative order has been issued by the board authorizing a more limited nursing practice, all in violation of condition 7; Trejos did not notify the board of his termination from employment with Coast Communities Hospital, in violation of probation condition 8; Trejos did not obtain approval from the board before commencing employment with Barlow Respiratory Hospital, a medical facility, or before commencing employment with Advanced Dialysis, a nurse registry, each in violation of probation condition 9; Trejos worked at Advanced Dialysis, a nurse registry, in violation of probation condition 10; Trejos did not complete assigned case work, in violation of probation condition 11; and, Trejos failed to make any payment of the \$7,363 costs he agreed to pay in the stipulated settlement, in violation of probation condition 12. These matters, taken together, support a finding that Trejos failed to cooperate with the board's probation program, which was in violation of probation condition 1.³

Evidence in Mitigation/Aggravation⁴

6. (a) Respondent was born on October 13, 1956, in Long Beach, California. He is presently 51 years old. He left Los Angeles after his birth and returned as a teenager when he was 13 years old.

² This finding is based on Respondent's testimony at hearing, as well as evidence received by taking official notice of the BRN's license verification data on its website.

³ The reference to probationary condition 1 appears to be an error; it is probationary condition 3 that deals with failure to comply and cooperate with the BRN's probation program.

⁴ These Findings are based on the ALJ Ahler's proposed decision that the BRN adopted as its Decision and Order on the Petition to Revoke Probation, and Respondent's testimony at hearing in the instant matter.

(b) After graduating from Pioneer High School in Whittier, California in 1974, Respondent was on active duty with the United States Air Force for six months. He received a hardship discharge so that he could return home to help his mother care for his three younger brothers and one younger sister.

(c) Following his discharge from the service, he held several jobs and attended school where he trained to become a respiratory care therapist. He began working as a respiratory care therapist in 1976. In 1985, when respiratory care practitioners were first licensed, Respondent received his license. Respondent worked full time as a respiratory care practitioner from 1976 until about 1990.

(d) While Respondent was working as a respiratory care practitioner, he attended a registered nursing program at East Los Angeles Junior College. He received an associate of arts degree in nursing. Upon his completion of the course work, he took and passed the registered nurse licensing exam, and became a registered nurse in March 1990. He worked steadily as a registered nurse, primarily for nurse registries in intensive care units.

(e) Pursuing an interest in dialysis, Respondent completed an intensive three-month training course to become an acute dialysis nurse. He began working under intensive supervision as an acute dialysis nurse. He found the work challenging and financially rewarding. He very much enjoyed working with his patients.

(f) Respondent practiced registered nursing without incident from 1990 until he encountered his problems with the BRN in 2002 and 2003.

7. (a) Respondent was on duty in the intensive care unit at Brotman Medical Center on April 3 and 4, 1999. He asserted that he was very busy that day with many patients and did not realize that he had not charted the drug wastage in his notes. He claims to have administered the medications, as required. He knows that the BRN and his then employer accused him of taking the drugs. He also speculates that his accusers thought he was selling the controlled substances for profit. At the hearing in the instant case, Respondent was adamant that he did not take any drugs from the hospital. However, Respondent was not forthcoming in explaining the particulars of what occurred on April 3 and 4, 1999. He glossed over the specifics when testifying on his own behalf.

(b) Respondent has consistently maintained that he only signed the stipulated settlement in the BRN matter on his attorney's advice. He contends that he did not read the stipulated settlement closely before signing it, did not intend to admit to any wrongdoing, did not fully understand it, and did not realize that the probationary conditions were so arduous. He blames his attorney for not adequately explaining the stipulated settlement agreement's terms to him.

(c) Nonetheless, Respondent signed the stipulated settlement just below language indicating that he had “carefully read the above Stipulated Settlement and Disciplinary Order and have fully discussed it with my attorney I understand the stipulation and the effect it will have on my Registered Nurse. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the Board of Registered Nursing.”

(d) Soon after the BRN placed Respondent’s license on probation, he met with his probation monitor who went over the terms and conditions of his probation with him. He spoke with his BRN probation monitor several times thereafter. At one meeting, in August 2004, Respondent established that he had passed the psychological and physical examinations he was required to take in accordance with his BRN probationary terms.

(e) According to Respondent, the BRN probationary terms were so arduous that it was impossible for him to get a job as an RN. For example, the probationary terms required, among other conditions, that he obtain the BRN’s approval of new employment as an RN or in a health-related field; that he could not work for a nurse’s registry, in any private duty position, in a temporary nurse placement agency, or for an in-house nursing pool; and that he had to obtain prior approval regarding his level of supervision before commencing employment. He made his probation monitor aware of this problem. He claims that because he could not get a job, he could not fulfill other conditions of his probation, such as paying for additional coursework and reimbursing the BRN for its costs. Respondent maintains that he attempted to comply with his probationary terms; ultimately, however, he simply chose not to comply (see Factual Finding 5).

8. Before his RN license was revoked and thereafter, Respondent was sporadically employed as a respiratory care practitioner. He last worked in the respiratory care field in March 2008, when his employer terminated him after finding out about the formal charges against Respondent in this matter.

9. Respondent is currently not working and is unable to make a living or support himself. He tried to obtain employment in the respiratory care field without success. He is concerned about his prospects for employment in the event his respiratory care license is placed on probation.

10. Respondent has had no other disciplinary issues relating to his respiratory care licensure, except for the issues that arose with the BRN. He has been licensed as a respiratory care practitioner for 23 years.

11. Respondent did comply with the terms of his BRN probation, resulting in revocation of his RN license. He has expressed little regret or concern about his failure to comply. Similarly, he did not show any regret or remorse for the conduct

that led to the BRN's charges against him. His claims that he signed without knowing what was in the stipulated settlement are not credible in view of Factual Finding 7, above. Even if he did not read the stipulated settlement before signing it, once he learned of the probationary conditions, he was obligated to comply with them. His alternative was to petition the BRN to modify those conditions; but there was no evidence that he ever took steps to do so.

Costs of Prosecution

12. Complainant submitted a Certification of Prosecution Costs, signed by Deputy Attorney General Richard Marino, certifying that the Board incurred \$2,822.50 as its costs of prosecution in this matter. The evidence established that Complainant incurred costs of \$2,822.50 in the prosecution of this matter, all of which are deemed reasonable.

LEGAL CONCLUSIONS

1. Business and Professions Code section 3750, subdivision (m), provides as follows:

The board may order the denial, suspension, or revocation of, or the imposition of probationary conditions upon, a license issued under this chapter, for any of the following causes:

[¶] . . . [¶]

(m) Denial, suspension, or revocation of any license to practice by another agency, state, or territory of the United States for any act or omission that would constitute grounds for the denial, suspension, or revocation of a license in this state.

2. Cause exists to revoke Respondent's respiratory care practitioner's license pursuant to Business and Professions Code section 3750, subdivision (m), based on the acts or omissions set forth in Factual Findings 3 through 7 and 11.

3. (a) Cause exists pursuant to Business and Professions Code section 3753.5 to order Respondent to pay the Board's costs of investigation and prosecution in this matter, in the total amount of \$2822.50, by reason of Factual Findings 3 through 7, 11 and 12, and Legal Conclusions 1 and 2.

In *Zuckerman v. State Board of Chiropractic Examiner* (2002) 29 Cal.4th 32 (2002), the Supreme Court rejected a constitutional challenge to a cost regulation similar to section 3753.5. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost provision did not deter individuals from exercising their right to a hearing. Thus, the board must not assess the full costs where it would

unfairly penalize the respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the board must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; the board must consider a respondent's ability to pay; and the board may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. *Zuckerman*, supra at p. 45.

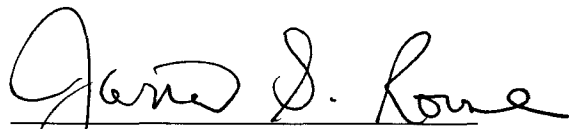
In this case, Respondent has demonstrated his inability to pay. He is not working and has no source of income (Factual Finding 9). This inability to pay is sufficient under *Zuckerman* to relieve Respondent from the obligation to pay the Board's costs of investigation and prosecution.

4. The evidence did not establish that probation would help Respondent move toward rehabilitation, which should be achieved prior to asking for the public's trust. While Respondent has been a licensee of the Board for many years without incident (Factual Finding 10), Respondent's failure to comply with the probationary terms of his RN license leads to the conclusion that were a probationary license issued in this matter, Respondent would fare no better. It is notable that some of the RN probationary conditions with which Respondent did not comply involved his failure to notify, or seek approval from, the BRN regarding his employment status as a nurse or in health-related fields (Factual Finding 5(d)). Even if some of the other conditions of his RN probation were restrictive, he could have complied with the notification and approval requirements. Moreover, while Respondent may have contemplated taking steps to ask the BRN to modify his probationary conditions, he did not do so. Also, Respondent was not a forthcoming witness at the hearing in explaining the particulars of his actions on April 3 and 4, 1999 (Factual Finding 7(a)). And, Respondent's contentions that he did not read the contents of the BRN's stipulated settlement and did not mean to admit the truth of the BRN's charges against him do not appear credible (Factual Finding 7). Given the foregoing, the order that follows is necessary for the protection of the public health, safety and welfare.

ORDER

Respiratory Care Practitioner's License Number 8499, issued to Duke Rocky Trejos, is hereby revoked.

DATED: September 29, 2008


JANIS S. ROVNER
Presiding Administrative Law Judge
Office of Administrative Hearings